No. 83-454

# In the Supreme Court of the United States

OCTOBER TERM, 1983

STEVEN S. GLICK, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTION PRESENTED

Whether petitioner was denied the effective assistance of counsel by his counsel's alleged failure to conduct adequate pretrial preparation.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Page

Statutes:

# In the Supreme Court of the United States

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 710 F.2d 639.

### JURISDICTION

The judgment of the court of appeals was entered on June 10, 1983. A petition for rehearing was denied on July 27, 1983. The petition for a writ of certiorari was filed on September 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted on eight counts of mail fraud, in violation of 18 U.S.C. 1341, and two counts of traveling in interstate commerce to execute a scheme to defraud, in violation of 18 U.S.C. 2314

(Pet. App. A1-A2). He was sentenced to concurrent five-year terms of imprisonment on each count, all but six months of which was suspended in favor of five years' probation. Petitioner was also ordered to provide full restitution as a special condition of probation.[1]

1. Petitioner's trial counsel was Harland W. Braun, a criminal law specialist, former prosecutor, and member of the California Counsel of Criminal Justice. Pet. App. A24. The facts relevant to petitioner's claim herein that Braun rendered ineffective assistance are recited in the opinion of the court of appeals.

Petitioner was convicted on the basis of his participation in a fraudulent scheme devised by Reginald Chisholm. Chisholm held himself out during 1975 and 1976 as a very wealthy person who, in return for a nonrefundable front fee, could package and obtain loans for people seeking financing. Chisholm represented to his victims that he would guarantee the loans and that his guarantee would be respected by lending institutions because of his wealth. As evidence of these claims, Chisholm showed his victims financial statements describing his personal wealth and that of three corporations he owned or controlled. Petitioner, a certified public accountant, prepared these statements and attached to them letters certifying that the statements fairly represented the subject's financial position in conformity with generally accepted auditing standards and accounting principles. Pet. App. A4-A5.

Chisholm's and his corporations' principal asset was a claim to mineral rights in limestone formations in national forests. Chisholm had transferred the rights to one of his corporations and then to the others in succession, increasing the valuation of the mineral rights with each transfer.

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[1]Petitioner's co-defendant, Reginald Chisholm, pleaded guilty prior to trial (Pet. App. A5).

Chisholm previously had been convicted in federal district court in Portland, Oregon, on charges apparently involving other acts in the same fraudulent plan. Pet. App. A5-A6.

Among the major issues at petitioner's trial were the actual value of Chisholm's mineral rights and the nature of his title to them. The government's expert, a geologist with the Department of the Interior, testified that the claims were overvalued on the financial statements and that Chisholm faced insurmountable obstacles if he attempted to mine the limestone or to obtain the fee simple title necessary for a proposed real estate development. Petitioner testified that four appraisals substantially supported the values contained in the financial statements. He could not recall the authors or details of the two earliest appraisals, and he testified that he did not accept at face value a third appraisal because Smith, the real estate appraiser who made it, was not a geologist and had an interest in Chisholm's enterprises. However, petitioner testified that Smith's results had been verified by an independent appraiser, Goldring, who used facts and figures supplied by Smith. The Smith appraisal was admitted into evidence, but petitioner was unable to produce the Goldring report. A fifth appraisal was admitted into evidence by stipulation of the parties. That appraisal, conducted by a geologist named Stickel, was obtained by Chisholm in preparation for his 1978 trial in Portland and stated that one of the mineral claims contained sufficient limestone deposits to warrant consideration of commercial mining. Stickel did not testify at trial. Pet. App. A6-A8.

2. On appeal, petitioner claimed that he was deprived of the effective assistance of counsel by reason of Braun's alleged failure to investigate the existence and nature of the two earliest mineral appraisals and the Goldring appraisal and to determine the possibility of obtaining favorable independent expert testimony from Stickel regarding the

value of the limestone. The court of appeals rejected petitioner's claim, concluding that petitioner had failed to show that his lawyer had not " 'exercise[d] the skill, judgment and diligence of a reasonably competent defense attorney.' " Pet. App. A19, quoting *Dyer* v. *Crisp*, 613 F.2d 275, 278 (10th Cir.) (en banc), cert. denied, 445 U.S. 945 (1980). The court noted that petitioner had offered no objective evidence to support his bare allegations that the appaisals he claimed his lawyer failed to secure were available, credible, or favorable to the defense (Pet. App. A22). In the absence of such a showing, the court presumed that Braun's decision not to produce the appraisals, even if they were available, was a tactical one. The court of appeals also concluded that Braun's decision not to call Stickel as a witness was tactical. Braun had read Stickel's testimony at the Portland trial and thus could evaluate the benefits of calling him as a witness on petitioner's behalf. The court of appeals noted in this regard that Braun had expressed doubt about Stickel's value as a witness because Chisholm was still indebted to him for $40,000. Pet. App. A23.

## ARGUMENT

Petitioner contends (Pet. 17-45) that he was denied the effective assistance of counsel at trial. This claim was raised for the first time on appeal; it was not presented in district court in a motion for a new trial or for collateral relief under 28 U.S.C. 2255. There accordingly has not been an opportunity for the district court to develop a record or to make factual findings with respect to the existence or contents of the first three appraisals and the nature of any testimony Stickel might have given. Nor has evidence been developed or findings made with respect to the reasons for counsel's actions or their impact on the trial. In these circumstances, the Court cannot meaningfully review petitioner's claim that his attorney rendered ineffective assistance. Because of difficulties such as these, the courts of appeals are in general

agreement that claims of inadequacy of counsel must be raised for the first time in the district court.[2]

If petitioner has evidence to support his claim and can show that prejudice resulted, he can seek relief under 28 U.S.C. 2255. There accordingly is no reason to consider the ineffective assistance of counsel claim further on direct appeal. If the case were remanded to the district court for further proceedings, as petitioner urges (Pet. 40-44), the result would be to prolong the proceedings on direct review, postpone the finality of petitioner's conviction, and give defendants a delaying tactic by providing an incentive to raise an ineffective assistance of counsel claim for the first time on direct appeal.

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[2]See, *e.g.*, *United States* v. *Badolato*, 701 F.2d 915, 925 (11th Cir. 1983); *United States* v. *Frankenberry*, 696 F.2d 239, 241-242 (3d Cir. 1982), cert. denied, No. 82-6301 (June 27, 1983); *United States* v. *Sturm*, 671 F.2d 749, 751 (3d Cir. (1982)), cert. denied, No. 81-6689 (Oct. 4, 1982); *United States* v. *Lurz*, 666 F.2d 69, 78 (4th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Hendricks*, 661 F.2d 38, 43 (5th Cir. 1981); *United States* v. *Aulet*, 618 F.2d 182, 185-186 (2d Cir. 1980); *United States* v. *Payton*, 615 F.2d 922, 925 (1st Cir.), cert. denied, 446 U.S. 969 (1980); *United States* v. *Gray*, 611 F.2d 194, 197 (7th Cir. 1979), cert. denied, 446 U.S. 911 (1980); *United States* v. *Kazni*, 576 F.2d 238, 242 (9th Cir. 1978).

A number of courts have expressed the view that the filing of a motion under 28 U.S.C. 2255 is the appropriate way in which to raise an ineffective assistance of counsel claim. See *United States* v. *Badolato*, 701 F.2d at 926; *United States* v. *Frankenberry*, 696 F.2d at 241-242; *United States* v. *Sturm*, 671 F.2d at 751; *United States* v. *Aulet*, 618 F.2d at 185-186; *United States* v. *Kazni*, 576 F.2d at 241-242. Review of an ineffective assistance of counsel claim on direct appeal is not precluded, however, if it was first raised in a new trial motion in district court where the court would have had the opportunity to make a factual record. See *United States* v. *Aulet*, 618 F.2d at 186 n.3; accord *United States* v. *Badolato*, 701 F.2d at 925-926. See also *United States* v. *Katz*, 425 F.2d 928 (2d Cir. 1970).

The objections to petitioner's suggested disposition are especially apparent here. As the court of appeals concluded, the trial strategy of petitioner's counsel "was apparently to convince the jury that the Government had hidden witnesses and documents helpful to the defense. Moreover, the absence of the documents and testimony made it possible for counsel to imply to the jury that the evidence would have been favorable to [petitioner]" (Pet. App. A24). On appeal, petitioner switched his position, abandoning his earlier tactic of charging that the government had withheld witnesses and documents and instead accused his attorney of failing to investigate and produce allegedly helpful information. The court of appeals concluded that Braun had pursued a reasonable trial strategy in taking the first approach and declined to accept petitioner's contrary allegations in the absence of objective, evidentiary support (Pet. App. A22). To require a remand to the district court for development of such evidence based on nothing more than petitioner's bare allegations would result in an unwarranted delay in proceedings on direct review and create an incentive for appellants to attempt to convert reasonable tactical decisions into incompetent failures by counsel to investigate and produce evidence, in an effort to forestall the finality of the judgment of conviction. Accordingly, this case does not warrant the Court's review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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